

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

IN RE: : Chapter 11
: Case No 04-12002-JLP
BLAKE OF CHICAGO, CORP., et al., :
f/k/a A.B. DICK COMPANY, et al., :
: Jointly Administered
Debtors. :

MHR CAPITAL PARTNERS LP, MHR :
INSTITUTIONAL PARTNERS LP, MHRM :
LP, and MHR FUND MANAGEMENT LLC, :
Appellant, : CIVIL ACTION
v :
BLAKE OF CHICAGO, CORP., et al., :
f/k/a A.B. DICK COMPANY, et al., :
and PRESSTEK, INC., :
Defendants. : NO. 04-1498 (KAJ)

Wilmington, Delaware
Wednesday, May 25, 2005 at 9:00 a.m.
ORAL ARGUMENT

BEFORE: HONORABLE KENT A. JORDAN, U.S.D.C.J.

APPEARANCES:

JASPAN SCHLESINGER HOFFMAN
BY: FREDERICK B. ROSNER, ESQ.

and

Brian P. Gaffigan
Registered Merit Reporter

1 APPEARANCES (Continued)

2
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4 BY: H. JEFFERY SCHWARTZ, ESQ., and
5 MARK PHILLIPS, ESQ.
6 (Cleveland, Ohio)

7 Counsel for Blake of Chicago Corp., et
8 al. f/k/a A.B. Dick Company, et al.

9 MONZACK and MONACO, P.A.
10 BY: FRANCIS A. MONACO, JR., ESQ.

11 and

12 McDERMOTT WILL & EMERY
13 BY: LAWRENCE SLATTERY, ESQ.
14 (New York, New York)

15 Counsel for Presstek, Inc.

16 LANDIS RATH & COBB LLP
17 BY: MEGAN N. HARPER, ESQ.

18 and

19 KASOWITZ BENSON TORRES & FRIEDMAN, LLP
20 BY: MICHAEL M. FAY, ESQ.
21 (New York, New York)

22 Counsel to Third Party Plaintiffs MHR
23 Capital Partners, LP, MHR
24 Institutional Partners, LP, MHRM LP
25 and MHRM Fund Management LLC

BUCHANAN INGERSOLL, PC
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Counsel for Key Bank

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P R O C E E D I N G S

(Oral argument began at 9:00 a.m.)

THE COURT: Good morning. Please be seated.
Why don't we start with introductions?

MR. MONACO: Good morning, Your Honor. My name is Frank Monaco. I represent one of the appellees, Presstek and related entities.

Your Honor, I'd like to take a minute to introduce and move the admission pro hac vice of my co-counsel Larry Slattery. He is a member of good standing of the bar of New York. He is a member of the firm McDermott Will & Emery. He'll be making the presentation to the Court today.

THE COURT: All right. Mr. Slattery.

Who do I have from the -- actually, why don't I find out who else is in the courtroom.

MR. ROSNER: Good morning, Your Honor. My name is Fred Rosner with Jaspan Schlesinger Hoffman here in Wilmington, Delaware. I'm appearing here today on behalf of the debtors. I'd like to move the admission pro hac vice of my co-counsel, Mr. Mark Phillips and Mr. Jeffrey Schwartz of the firm Bennett Friedlander Coplan & Aronoff from Ohio. They're both members of good standing of the courts of Ohio.

I believe Mr. Phillips will be making the

1 presentation today. We have an order already entered into
2 the court admitting him pro hac vice.

3 THE COURT: All right. Thank you.

4 Welcome, gentlemen.

5 Go ahead, ma'am.

6 MS. HARPER: Good morning, Your Honor. Megan
7 Harper of Landis Rath & Cobb. With me here today is Michael
8 Fay of Kasowitz Benson Torres & Friedman. Mr. Fay's motion
9 for pro hac vice has been approved and he will be presenting
10 on behalf of the appellants.

11 THE COURT: All right. Thank you.

12 MR. NIMEROFF: Good morning, Your Honor. My
13 name is Jami Nimeroff. I'm with the law firm of Buchanan
14 Ingersoll appearing on behalf of Key Bank, one of the
15 appellees in this matter.

16 THE COURT: All right. Well, I have two
17 competing motions here. And I'm going to hear you on both
18 of them, and I guess I'll hear about the motion to dismiss
19 as moot first. What I would like to do is, Mr. Fay, are you
20 going to be handling the argument?

21 MR. FAY: Yes, I will.

22 THE COURT: Why don't I ask to you come to the
23 podium first. I have some questions I want to ask you
24 specifically; all right?

25 MR. FAY: All right. Thank you, Your Honor.

1 THE COURT: Of course, you know what your
2 opponents have said. I want you to answer specifically the
3 assertions that they make that because MHR failed to seek a
4 stay and because the Bankruptcy Court expressly held that
5 Presstek was a good faith purchaser that you're out of luck.
6 You are done.

7 And I'm assuming that as a factual matter,
8 everyone agrees MHR didn't seek a stay; right?

9 MR. FAY: Yes, Your Honor. There is no dispute
10 as to that.

11 THE COURT: Can you tell me why?

12 MR. FAY: Well, it's the whole In Re: Abbotts
13 Dairies, Your Honor, which is that the mootness of the
14 appeal under 363(m) requires a real finding of good faith.

15 THE COURT: Okay. I'm sorry. I didn't ask my
16 question right, I guess. Can you tell me why MHR didn't
17 seek a stay? Do you know as a factual matter why they
18 thought, "oh, you know what? Let's not do it?"

19 MR. FAY: Because the singular issue we saw here
20 as controlling this appeal and as being the defect in the
21 findings and the sale order was the issue of good faith
22 because the problem was there was significant evidence
23 that Presstek had taken actions to control the sale price,
24 actions that led up to an auction that was not selling the
25 same debtor that existed in June of 2004. That's an issue

1 that goes directly to the findings in In Re: Abbotts
2 Dairies about the integrity of the purchaser, the integrity
3 of the actor in the sales process. Those are issues that do
4 not require that the sale not go forward.

5 What the Third Circuit said is that the District
6 Court, on appeal, will now look at the issue of good faith
7 and if it determines that there is at least some dispute or
8 there wasn't sufficient findings as to good faith or if it
9 determines there really wasn't good faith that the case gets
10 remanded to the Bankruptcy Court for remedies. It's there
11 we address the issue of whether at this point what remedies
12 are available.

13 THE COURT: Let me ask you this then. Do I
14 understand you to be saying that MHR made a purposeful
15 decision not to seek a stay and let a sale go through to let
16 all the reliance that develops around a completed sale to
17 occur because it said we're going to make this good faith
18 argument on appeal and because there is a Third Circuit case
19 that gives us an out there, we won't seek a stay? Did I
20 understand that right?

21 MR. FAY: Right. It's not even just the Third
22 Circuit case. The actual statute itself says that the
23 protections of 363(m) only apply to good faith purchases.

24 THE COURT: Could MHR have sought a stay on the
25 basis of lack of good faith pending appeal and said, hey,

1 let's get a stay. We really think this is a serious issue.
2 We want the District Court to look at this and we don't want
3 any reliance arguments to be thrown at the District Court.
4 Let's get a stay. Would that have been within the bounds of
5 the law?

6 MR. FAY: I'm sure it would have been, Your
7 Honor. But when you think about the relief we're seeking
8 here, it doesn't really demand a stay as it would in other
9 situations. The real problem here is that there is real
10 evidence of unlawful conduct by Presstek that resulted
11 in less than full value going to the estate and the real
12 issue is that one of the provisions of the asset purchase
13 agreement, which has nothing to do with the validity of the
14 sale, the release of Presstek on those claims is presently
15 being enforced.

16 THE COURT: Well, with all due respect, Mr. Fay,
17 that is a real issue but it's not the real issue. Another
18 real issue is the policy behind 363(m), the finality, the
19 reliance issues, all of which might have been obviated had
20 your client thought it worth its while to get a stay. Then
21 I wouldn't have these people at this table here thrown
22 throwing at me reliance-finality, reliance-finality. So to
23 say the real issue is good faith seems to me to pretty
24 blithely skip over the decision. You are telling me your
25 client ignored the purpose of a stay, let a sale go through

1 and have it brought to me months later and say unw
2 because it's all about good faith, judge. And that
3 would not agree that finality and reliance are a real issue?
4 To you, the only issue is the good faith thing?

5 MR. FAY: Yes, Your Honor. That is what the
6 Third Circuit has said in In Re: Abbotts Dairies. They
7 made an oral motion for a stay. The Court invited them to
8 come in with a written motion for a stay. They didn't do
9 it. And what the Third Circuit said, that on this issue it
10 doesn't matter. And it was remanded to the District Court.

11 THE COURT: I read your cases. I read the case.

12 All right. Let's talk specifically about good
13 faith. Give me your position as to why the findings by the
14 Bankruptcy Court are so superficial, so untethered to the
15 record as to be worthy of no credence.

16 MR. FAY: Because, Your Honor, they're just
17 simply conclusory statements of the evidence that was
18 submitted of bad faith deals with the termination of the
19 stock purchase agreement, which was a valuable asset of A.B.
20 Dick before it went into bankruptcy. The termination was on
21 a pretext. The termination of the joint venture agreement,
22 also a valuable asset of A.B. Dick. Neither one of those
23 two factual scenarios are even mentioned in the order and
24 the hearing transcript contained nothing that the Bankruptcy
25 Court even considered that evidence.

1 We have cited case law, controlling case law
2 from New York -- this agreement was governed by New York
3 law -- that the formalistic differences between the consent
4 -- excuse me, Your Honor -- that Key Bank gave on funding
5 and what was actually in the form of consent are not --

6 THE COURT: Are you okay? Do you want to take a
7 break, get a drink?

8 MR. FAY: I'm fine. I'm fine.

9 -- they're not material. The reality was that
10 on the 22nd of June, 2004, everything was in place for the
11 stock purchase agreement to go forward. If that stock
12 purchase agreement had gone forward, the unsecured creditors
13 of this estate would have real value. There wouldn't even
14 be unsecured creditors.

15 Instead, we have an estate with less than \$1
16 million of cash. This deal got nothing for the estate.
17 There was a deal in place only three and-a-half weeks
18 earlier and we say that there was no legal grounds to
19 walk away from it. We did discovery on it. The debtors
20 participated in that discovery and yet no consideration was
21 given to that issue and to say, well, that is because good
22 faith doesn't entail that kind of conduct cannot possibly be
23 true.

24 THE COURT: Okay. Now, stop there.

25 Who is speaking to this issue from the other

1 side?

2 MR. SLATTERY: The way Mr. Phillips and I had
3 proposed dividing it up, I would address mootness because I
4 represent Presstek and that was our motion.

5 THE COURT: All right. Then Mr. Slattery, I'll
6 just have you stand right there and ask you a question or
7 two.

8 Mr. Fay, I want you to reiterate. I think I
9 heard you mention two things that are indicia of bad faith,
10 I guess I would say, and which were, according to the
11 appellants, absolutely unaddressed. Did I understand you
12 right?

13 MR. FAY: That's correct.

14 THE COURT: You cited nothing in the record,
15 completely blown past by the Bankruptcy Court. What is your
16 response to that, Mr. Slattery?

17 MR. SLATTERY: The Bankruptcy Court in the sale
18 order on the record made numerous findings of good faith.

19 THE COURT: Well, I don't want us to be talking
20 past each other. I want you to speak exactly to that point.
21 I don't want to you say the judge made findings of good
22 faith. I want you to speak to the point that the judge
23 didn't speak at all about these.

24 Go ahead and state them again. What are the
25 indicia of bad faith, Mr. Fay?

1 MR. FAY: That on June 22nd, 2004, the debtors
2 in this case had in hand an enforceable stock purchase
3 agreement and agreed-upon funding from Key Bank as was
4 required and that, nonetheless, Presstek walked away from
5 that deal, a deal that was worth, by some estimates, \$30
6 million more than the one that was ultimately approved.

7 The second is that prior to July 30th, 2004,
8 when the debtor went into bankruptcy, it also had a valuable
9 joint venture address for Presstek which Presstek terminated
10 prior to that date and prior to the sale process.

11 THE COURT: Okay. Then the assertion is made
12 that as to those two things, the Court not only paid less
13 than scant attention but do I understand your opponent right
14 he is saying that the Court paid no attention to it? That
15 is what I want to you address as a factual matter, taking me
16 to the record. Do you understand?

17 MR. SLATTERY: The Court did not, as far as I
18 recall, specifically say here are the reasons that I reject
19 everything you just said. He did reject it and the law and
20 certainly the law is that -- and we've cited this in our
21 briefs -- is that the good faith standard in a 363 deal
22 relates to good faith in the conduct of the sale.

23 There is a couple of points here and I'll have
24 to go a little bit into contradicting or disagreeing with
25 what Mr. Fay said about the record. But the first thing,

1 legal point is that it has to do with bad faith in the
2 conduct of the 363 sale process. Their claim does not
3 allege misconduct in the sale by the vendee, 363 sale
4 process. What they're saying is before there was a 363
5 sale, before there was a bankruptcy filing, they say that
6 Presstek breached -- essentially breached a contract to
7 buy the stock.

8 THE COURT: That was a little stronger than
9 that. Mr. Fay, you correct me if I'm wrong. I take their
10 papers to be saying Presstek effectively drove them into
11 bankruptcy. It wrecked their business prospects to such a
12 degree that it sent them into bankruptcy. Did I read too
13 much into what you said?

14 MR. FAY: No, Your Honor. I think that is a
15 fair reading of what we were saying.

16 MR. SLATTERY: That is contradicted by the
17 record in the case because the banker from Key Bank who was
18 financing A.B. Dick, the debtor, testified that they would
19 have put them into bankruptcy much sooner if it weren't for
20 the prospect of Presstek buying the company.

21 THE COURT: So let me understand this. Go
22 back to your legal point, and then I want you to answer the
23 specific factual standpoint I had you stand up for. Okay?

24 Assume for the sake of argument a scenario of
25 the sort that Mr. Fay has described where a purchaser in

1 fact sends a party into bankruptcy by bad faith dealing with
2 it and then goes in and buys it as clean as a whistle in the
3 sale process. You are telling me that as a legal matter,
4 that is not a basis for finding that the buyer is tainted
5 and therefore not a good faith purchaser. Have I understood
6 you right?

7 MR. SLATTERY: Yes. In the Third Circuit, there
8 is no precedent for that.

9 THE COURT: And you don't have to justify. I'm
10 just asking have I understood you right? And I think I
11 have.

12 MR. SLATTERY: Yes, and the only way it happens
13 the presale conduct could be relevant is if it was somehow
14 something that interfered with other bidders in post-filing
15 matters. There is one case that although it rejected the
16 claim, at least didn't entirely throw out that proposition
17 but it had to do with presale conduct that was directly
18 designed to effect the bidding process and mislead other
19 bidders and squeeze them out.

20 It has nothing to do with what happened here.
21 Here, there was a bidding process for months. There was
22 hundreds of companies solicited to bid and nobody else came
23 forward and put in a qualified bid. Please keep in mind no
24 one else was interested in buying this company. If it
25 hadn't been sold to Presstek, everything would have fallen

1 apart and they would have had less money and the company
2 presumably would have had to have been liquidated because
3 there was no other buyer and the company wouldn't continue.

4 THE COURT: Now, speak to me about the two
5 points I wanted you to talk about. I'm going to give you
6 your chance at the podium. Don't worry. I'm just looking
7 now for a response to the specific factual assertion that
8 the judge, to paraphrase Mr. Fay, there is nothing in the
9 record to show that the judge gave any consideration at all
10 to these two points which MHR relies on so heavily to
11 demonstrate that.

12 MR. SLATTERY: The judge asked questions of
13 them. They didn't put on any witnesses. And so the
14 question, if the question is did the judge, in his order,
15 specifically say "I reject their argument about these
16 issues," he didn't say that. He just rejected them,
17 as well he should have because, amongst other things,
18 the fundamental premise of their argument they provided
19 no evidence for, as I'm sure you will hear more on the
20 motion on the appeal.

21 So it was an absolute failure of proof on them.
22 Because the whole premise was that Presstek was bound to do
23 something when in fact the condition precedent for Presstek
24 being bound to go forward with the sale was that the bank
25 signed a very specific consent and agreement form and what

1 they'll tell you in their papers is the bank sent a letter
2 that basically qualified for that. The fact of the matter
3 is the agreement that they're saying we breached expired on
4 its -- was never entered into by Presstek. Their agreement
5 to do that was explicitly conditioned on getting a specific
6 form signed and it was never signed and there is no question
7 about that. And if you looked in the record to find that
8 specific form, you would not find it.

9 THE COURT: All right. I'm going to give you
10 your crack at the podium in a few minutes. Be ready to
11 answer two things which I'm going to give Mr. Fay a chance
12 to talk about now.

13 One is how does the decision in In Re: Abbotts
14 Dairies square with your assertion that under Third Circuit
15 law, presale behavior is entirely irrelevant? Okay?
16 Because obviously your opponent is hanging his hat, if not
17 entirely, pretty close to entirely my reading In Re:
18 Abbotts Dairies the way he wants.

19 And the second thing to be addressed is what I
20 have been questioning Mr. Fay about and will continue to for
21 the next couple of minutes, whether or not the judges, the
22 bankruptcy judge's rulings are "wholly conclusory." What
23 can you show me about those rulings? What can you tell me,
24 showing me the record, that indicates or demonstrates that
25 the Bankruptcy Court did its job, which is what I hear your

1 opponent saying it didn't. All right?

2 Now, Mr. Fay, since you are up first, I want
3 you to answer the question about, let's continue with this
4 question about conclusory findings. When you say there is
5 nothing in the record, you know, you folks gave me several
6 volumes. I'll freely confess I haven't read all of them
7 but I want you to talk to me about what was going on there?
8 Was the bankruptcy judge just sleeping during all that? Is
9 there any conclusion at all to be drawn from the fact that
10 evidently there were lengthy proceedings over which this
11 judge presided at which you tried to make your pitch and
12 were twice rejected; right? I mean you brought it up twice
13 and twice got shot down. Is there nothing to be concluded
14 about the Bankruptcy Court's efforts to get at the truth
15 from the fact that you had two bites at this apple already
16 and a lengthy hearing?

17 MR. FAY: I'm not sure you could say we got shot
18 down twice. We got shot down once at the final hearing on
19 this. We filed two sets of objections but those two sets of
20 objections were not considered until final hearing.

21 THE COURT: Well, maybe your opponents briefing
22 took me off the mark but I understood that you had objected
23 to the sale procedure.

24 MR. FAY: Correct.

25 THE COURT: And that was rejected. And you

1 objected to the sale procedure in part on this good faith/no
2 good faith, Presstek doesn't have good faith argument;
3 right?

4 MR. FAY: My understanding is that the sale
5 procedures were ultimately agreed upon by the parties.
6 There was an actual --

7 THE COURT: Really. Because --

8 MR. FAY: -- a resolution reached on those
9 procedures.

10 THE COURT: The assertion is made by your
11 opponent that you made that objection to the sale procedure
12 and the Bankruptcy Court denied it. Not that it was an
13 agreement but that the Bankruptcy Court said "MHR, you
14 lose." And then after the auction, you again made the
15 objection --

16 MR. FAY: Right.

17 THE COURT: -- that Presstek is not a good faith
18 purchaser and again the Bankruptcy Court said you lose.

19 MR. FAY: Right, but it's two different
20 concepts. Right? One is what will the procedures be for
21 the sale process.

22 THE COURT: Well, I understand that. But wasn't
23 the nub of your objection in both instances, even though it
24 was at different stages that, "hey, Presstek can't be in
25 this game because they're dirty, they're not good faith

1 purchasers?"

2 MR. FAY: That's correct. That is was part of
3 it. Yes, you're right, Your Honor.

4 THE COURT: So talk to me then, when you say
5 "wholly conclusory," I want you to work with me and tell me
6 what it is that the Bankruptcy Court didn't do or failed to
7 do in hearing you twice on the issue of Presstek being a
8 malefactor and rejecting you twice.

9 MR. FAY: Okay. Well, on the first time it was
10 before we conducted any discovery; all right?

11 The second time when we're at the sale hearing,
12 discovery had taken place, we took that discovery. We took
13 the thing that we discovered. We took the evidence that Key
14 Bank actually had consented to funding and we put all that
15 before the Court. We argued to the Court, "look at this.
16 This is real value. This is value that the estate was
17 deprived of." We also put before the Court the testimony
18 of Presstek principals about the termination of the joint
19 venture agreement. So at the sale hearing the judge had
20 real evidence before him on these issues, evidence that had
21 been gleaned from discovery that he had allowed.

22 There is nothing -- the only comment that the
23 bankruptcy judge made about this concept during the hearing
24 was to at one point, toward the end of the hearing, offer
25 the claim to MHR in exchange for MHR's unsecured claim in

1 the bankruptcy. So the judge tried to do a trade. He said,
2 "look, you drop your claim, I'll give you this claim." And
3 then he retracted it. That is the only comment he makes
4 about this claim during the entire hearing.

5 And then we get an order that was drafted by
6 counsel that has these buzz words about good faith. The
7 judge offered us the claim. He must not have thought it
8 was completely frivolous to offer it to us. And I wasn't in
9 there when it happened but I believe my partner indicated we
10 would have taken it. And then it was retracted, the offer
11 was retracted.

12 To just put in, you know, In Re: Abbotts
13 Dairies, first of all, In Re: Abbotts Dairies addresses
14 diminution in value prior to the sale process so the concept
15 that that is not within the definition of bad or good faith
16 is just not true. It also says --

17 THE COURT: All right. Well, then you tell me
18 why it's just not true. I mean you will be most helpful
19 to me if you take me to the specific language in the case.
20 They're saying it has nothing to do with it. You are
21 telling me "oh, no, it does." If you have the case, show
22 me. Show me.

23 MR. FAY: If you look at -- it's on page 148 in
24 the decision. The Court points out that some of the
25 objections were that the Abbotts, the debtor's value had

1 been greatly diminished by an interim agreement, okay?

2 THE COURT: 148 where?

3 MR. FAY: Right at the bottom of 148, Your
4 Honor.

5 Then if you look just on the same page, right
6 below footnote six, in the paragraph that starts, generally
7 speaking, an auction may be sufficient to establish one has
8 paid value for the assets after bankruptcy. In the present
9 case, on the other hand, we reject the assertion that the
10 auction conducted for Abbotts assets necessarily establishes
11 that ABC paid value if Abbotts and ABC colluded in its
12 motion to approve the interim agreement in attempt to chill
13 the bidding for the assets involved. It would follow that
14 no auction took place in the Bankruptcy Court. Thus, the
15 bidding could not, by definition, serve as the final arbiter
16 of the value of Abbotts' assets.

17 THE COURT: All right. Where are you on that?

18 MR. FAY: It's the whole paragraph that starts
19 out with "generally speaking" on 149, Your Honor.

20 THE COURT: It's on 149?

21 MR. FAY: Right. Yes.

22 I'm sorry. It's on the next page.

23 So here we have a situation where there was an
24 interim agreement and the allegation was that that interim
25 agreement affected the value of the debtor so what was

1 actually being auctioned was less -- it either was of less
2 value or it looked to be of less value than it should
3 have been. That is exactly the same kind of thing we are
4 arguing here.

5 THE COURT: Well, there, didn't the Third
6 Circuit say there really wasn't an auction? Here, there was
7 an auction.

8 MR. FAY: Well, there was an auction here, too.
9 I think what the Third Circuit is saying is that when you
10 have so diminished the assets, you can't say that the sort
11 of economic concept of an auction works if you have taken an
12 asset, diminished it through some kind of wrongful conduct
13 and then say, oh, we got the best price. I mean the
14 definition of good faith is far broader than that. And in
15 the In Re: Abbotts Dairies, all the Third Circuit says is
16 that typically it says good faith goes to the integrity of
17 the actor's conduct. Typically, that will be fraud and
18 collusion, but it doesn't say exclusively. That is all it
19 says on that issue.

20 THE COURT: And here, your assertion is that the
21 bad faith is bad faith in business conduct prior to the sale
22 that diminished the value and, therefore, deprived MHR or, I
23 should say, the company the opportunity to have a legitimate
24 auction. Have I understood you right?

25 MR. FAY: Well, what it did was it so diminished

1 -- if you were going to auction this company, it should have
2 been auctioned with these assets. Right.

3 THE COURT: Now, talk to me for a moment about
4 -- and obviously we merged over into your appeal itself.
5 Talk to me for a moment about what is the relief you would
6 have me grant? In your ideal world, what would happen?
7 What are the words I would speak?

8 MR. FAY: One of two things, Your Honor. You
9 either look at the evidence and say I don't find good faith
10 here, send it back to see what the Bankruptcy Court can do
11 as far as relief. As In Re: Abbotts Dairies recognizes,
12 even on the issue of good faith, if it goes back to the --
13 there was certainly some limitations on the Bankruptcy
14 Court's ability to grant any relief. There is no evidence
15 here that this sale can't be untangled. But even if it --
16 let's assume it can. Let's just assume the representations
17 on that.

18 THE COURT: Yes, let's do.

19 MR. FAY: The Bankruptcy Court can look to other
20 forms of relief. That is the ideal. Send it back to the
21 Bankruptcy Court. Let's see what we can do here. Again,
22 this is an estate that is almost insolvent. This is the
23 only change the unsecured creditors have to find any real
24 value, okay?

25 Second, at the very least, send this back and

1 let's have a true airing of these issues. Let's have a
2 hearing where we specifically address the conduct of
3 Presstek in walking away from the stock purchase agreement,
4 in terminating the joint venture agreement and findings on
5 whether or not that really amounted to benefit them.

6 THE COURT: Well, haven't you said that you
7 aired those before and the problem is the Bankruptcy Court
8 didn't pay attention to them?

9 MR. FAY: Right.

10 THE COURT: So wouldn't you get to the same
11 place you are saying you ought to be able to go to if the
12 matter was remanded to the Bankruptcy Court with the
13 requirement that the Court review the record already extant?

14 MR. FAY: Right. Correct.

15 THE COURT: All right. Okay. I'm going to give
16 the podium to your opponent here for a bit, Mr. Fay.

17 MR. SLATTERY: Thank you, Your Honor.

18 THE COURT: Okay. Now, I don't know if there
19 is anything in anything Mr. Fay said in response to my
20 questions that lead you to say anything before you get to
21 the questions that I asked you, but please remember I want
22 to you answer those specific questions.

23 MR. SLATTERY: For the sake of moving things
24 along, I'll try to be very brief and not give a speech to
25 you. But Abbotts Dairies, Your Honor, was a situation in

1 which the Bankruptcy Court did not make any finding of good
2 faith. Abbotts Dairies is a Third Circuit case after which
3 after a bankruptcy 363 sale, the Third Circuit was asked to
4 put in findings of good faith. So the difference in Abbotts
5 Dairies, there was no finding of good faith, period, by the
6 Bankruptcy Court.

7 THE COURT: Well, you know, I think we get
8 past that pretty quickly by saying you need to address Mr.
9 Fay's argument that I can't allow form to be elevated over
10 substance. The argument your opponent is making is the
11 bankruptcy judge signed an order you put in front of him
12 that uttered the words "good faith" but that doesn't
13 constitute a true finding of fact. It's simply, you know,
14 you don't speak the magic words and that substitutes for a
15 true investigation of the record, a true examination of the
16 issue.

17 That is what I want you to talk to me about.
18 That is why I said get me into the record. It's because to
19 meet your opponent's argument, you have to do more than say
20 he signed an order that said "good faith" in it. You need
21 to plead that argument. You need to show me well, wait, he
22 was looking at this. He understood what was going on. He
23 was paying attention. I mean, it's in there. So that's
24 what you need to talk to me about.

25 MR. SLATTERY: First, I would say if they want

1 Your Honor to reject the findings, expressed findings and
2 repeated findings of the Bankruptcy Court that there was
3 good faith, they should cite precedent for that and they do
4 not. Abbotts Dairies does not. In Abbotts Dairies, the
5 court did not make a finding of good faith. So there is
6 absolutely zero precedent for what they're asking you to do
7 in that sense in the context of a 363 on bankruptcy.

8 Now, whether or not the judge was --

9 THE COURT: Now, stop, because I'll just go on
10 record with you right now saying I think you read Abbotts
11 Dairies too narrowly, bluntly. I think that because if your
12 argument to me is -- and I'm sure it's not, but if I took
13 you to the logical limits, what you are telling me is it
14 doesn't make any difference whether the bankruptcy judge
15 has actually got his head on the desk, sleeps through the
16 entire hearing, wakes up only long enough to sign an order
17 that the opposing counsel shoves in front of him and says
18 the words "good faith," that that is done because that is a
19 "finding" of good faith and therefore Abbotts is -- see,
20 that is the argument they're in effect making to me that
21 it's wholly conclusory and the judge failed to do his job.

22 So it's not helping me, in the process of
23 dealing with their argument, for you to say, "well, Abbotts
24 Dairies is different because there was no finding of good
25 faith and here there is" when the assertion from the other

1 side is that is a sham, defining good faith is a.
2 Sham. It's a lawyer construct. That the judge did nothing
3 to investigate. That is the point you need to answer.

4 MR. SLATTERY: Okay. The answer to that is
5 extensive testimony was presented by representatives of the
6 debtor. And I don't mean to step on Mr. Phillips who is
7 going to address these issues more fully, but the debtors
8 Chief Restructuring Officer and their Financial Officer
9 testified, MHR put on no witnesses. They testified to the
10 sale process. They testified to the fact that hundreds of
11 people were solicited, that it was narrowed down to some who
12 expressed they wanted to think about it further. That it
13 finally narrowed down to two entities, neither of which
14 filed a competing bid.

15 There is no evidence presented by anyone that
16 somehow Presstek was colluding with the debtor to affect the
17 bidding process, which is what Abbotts Dairies said. That
18 the requirement of the purchaser to act in good faith speaks
19 to the integrity of his conduct in the course of the sale
20 proceedings. Misconduct that would destroy the purchaser's
21 good faith status would be fraud, collusion between the
22 purchaser and other bidders or the trustee. That's the
23 standard for what you are looking at in this process.

24 THE COURT: Okay. Show me that again what you
25 are reading from.

1 MR. SLATTERY: That's Abbotts Dairies.

2 THE COURT: What page?

3 MR. SLATTERY: It's letter A. I have a printout
4 so it's hard for me to find it.

5 MR. PHILLIPS: 147, Your Honor.

6 THE COURT: All right.

7 MR. SLATTERY: That is the actual standard in
8 the Third Circuit when you are looking at this. So there
9 was extensive testimony on the sale process. And the fact
10 that no other bidder showed up, MHR didn't present any
11 evidence by somebody coming in and saying, gee, you know, I
12 would have put in a huge bid if it weren't for what Presstek
13 did supposedly did before the bankruptcy filing. There is
14 no connection between any of that. They put on no evidence
15 period in that regard. The only thing they talked about was
16 this supposed breach of the stock purchase agreement which
17 was never, by the way, never binding on Presstek.

18 So that is the record that was made. The rest
19 of it was MHR calling all the witnesses liars. They didn't
20 put on any testimony, and there is no question, no factual
21 question no, defense they can make to the validity of the
22 bidding procedures and the validity of the bidding process.
23 They didn't even try to make that. The only thing they
24 talked about was their belief, their claim that Presstek
25 breached the stock purchase agreement.

1 And I do want to make this point again, Your
2 Honor. The entire claim rested on saying that Presstek
3 wrongfully terminated by using a bogus excuse that Key Bank
4 did not sign what was called a consent and agreement. They
5 never put that into evidence. There's is no question Key
6 Bank never signed it and MHR did not put the document into
7 evidence.

8 THE COURT: And whose burden was that?

9 MR. SLATTERY: It was theirs. They're
10 challenging it. They're the ones who were -- they spent a
11 lot -- they spent two hours trashing everybody else but the
12 fundamental foundation of their entire claim, the consent
13 agreement, as far as I can tell was never put in the record.
14 If you look at your briefs, Your Honor, you won't find a
15 reference to it in the record from MHR.

16 THE COURT: Okay. Mr. Slattery, hold it right
17 there.

18 Mr. Fay, the assertion is that you had your shot
19 in the Bankruptcy Court and you had a fundamental failure of
20 proof on a point that you had the burden of proof on.

21 MR. FAY: Yes, and that document wasn't it.
22 What our point of proof was, our point of proof was that Key
23 Bank did consent. And we put in the evidence showing that
24 consent. If his defense was, yes, but he didn't sign this
25 document, that was his fundamental burden of proof to put

1 that in.

2 We put in evidence including testimony from an
3 official at Key Bank and a letter that Key Bank wrote that
4 they did indeed consent to further funding. If he want to
5 contradict that consent and claimed it wasn't in sufficient
6 form, that is his burden.

7 MR. SLATTERY: The escrow agreement by its terms
8 specifically states, this escrow -- what happened was they
9 had the documents, what everybody hoped would be final
10 form. Presstek would not sign because they said we want a
11 representation from Key Bank that they will continue to
12 fund, they will commit to fund working capital while the
13 sale process was pending in an amount necessary to get them
14 through the sale process. And it had other requirements.
15 It required them -- it's not in the record so I shouldn't
16 be testifying to it but let's suppose there is an agreement
17 that said you have to agree to fund through the proceeds
18 closing and you have to waive any defaults or anything else
19 like that through the closing.

20 They didn't sign it. The escrow agreement which
21 is in the record, which is at Appendix A 421 is the start of
22 the escrow agreement that says that "the escrow provided
23 hereunder," and under the escrow, the escrow was the holding
24 of the executed documents that would be released from escrow
25 when the conditions were met. "The escrow provided for

1 hereunder shall in no event be released until Key consents
2 to the transaction on the terms and conditions herein."

3 And it further says, the next page, in paragraph
4 3b: "From the date through close of business on June 22,
5 2004, Parent shall endeavor" -- Parent being the debtors --
6 "shall endeavor to obtain Key's consent and agreement to the
7 Proposed Transaction, such consent and agreement to be
8 evidenced by Key's execution of Exhibit A attached hereto."

9 That is the escrow agreement. Is it in the
10 papers that they put in front of Your Honor or before the
11 Bankruptcy Court? No.

12 Therefore, when they say, well, Key Bank sent
13 this letter and it was really the same thing they have, the
14 Court could never have accepted such an argument because
15 there was no basis of comparison. They're saying this
16 letter is the functional equivalent of the consent and
17 agreement but the consent and agreement was not in evidence.
18 No one could make that determination and it's an absolute
19 failure of proof. And not only was it an absolute failure
20 of proof but it was a conscious failure of proof.

21 THE COURT: All right. Speak, if you would,
22 please -- and if I'm taking you over into Mr. Phillips'
23 piece of the argument, you guys decide where one of you
24 wants to stand up and the other one to sit down because I
25 understand these things are pretty tightly interrelated --

1 to the record itself and what it does show. In other words,
2 the argument is made that, like I said, Mr. Fay is up here
3 saying the guy just -- you handed him a pen, you handed him
4 a piece of paper, he signed everything that was put in front
5 of him. That is essentially the assertion I am getting in
6 front of me. It's lawyer's language, it's not judicial
7 findings as to good faith.

8 Use your record. Argue to me from your record
9 about why I should say, hey, this is the real deal. Here is
10 a judge who had a big long hearing, paid attention, made
11 some findings. They stick.

12 MR. SLATTERY: Well, I will turn that over to my
13 colleague and superior, Mr. Phillips.

14 THE COURT: All right. Thanks, Mr. Slattery.

15 MR. PHILLIPS: Good morning, Your Honor. Mark
16 Phillips on behalf of the debtors.

17 Before I go into those issues, I would just like
18 to comment on two of the points that have been discussed so
19 far this morning.

20 Number one, with respect to the mootness issue,
21 I would simply point out that Abbotts Dairies was very
22 clear. The Court was very clear about what the purpose of
23 obtaining a stay is and what the purpose of the good faith
24 finding by the Bankruptcy Court is. It says, at page 150 of
25 the opinion. "Such a finding encourages" -- and this begins

1 the quote, "encourages finality of the Bankruptcy Court's
2 judgments under Section 363(b)(1) because it places
3 prospective appellants on notice of the need to obtain a
4 stay pending appeal or face dismissal for mootness pursuant
5 to Section 363(m), should the District Court affirm the
6 Bankruptcy Court's finding of good faith."

7 Your Honor, what Abbotts Dairies says is that
8 you don't even get to question good faith. If an explicit
9 finding, as happened in this case, is made regarding the
10 good faith purchaser and you don't seek a stay, you don't
11 get to pursue that appeal. That is what Abbotts Dairies
12 says. And this Court has previously applied that standard.

13 Second, Your Honor, this notion that somehow it
14 was the failure to go forward with the stock purchase
15 agreement that resulted in this debtor, these debtors
16 insolvencies. I would refer the Court to the testimony of
17 Gregory Nip (phonetic) at the August 23rd hearing on the
18 sales procedures motion. That is at B 0275 of the record
19 here. And beginning at page 57, in which Mr. Nip describes
20 how the debtor was insolvent months, months before the
21 events that Mr. Faye and MHR now complain of and the
22 financial situation that the debtor found itself in. It
23 wasn't any action of Presstek that drove these debtors into
24 bankruptcy, Your Honor. Rather, they were confronted with
25 the necessity of pursuing bankruptcy when they were unable

1 to complete the sale process because of their own financial
2 situation. And I believe Mr. Nip's testimony in that regard
3 is rather clear.

4 With respect to the record, your Honor, which
5 supports the Court's findings of good faith, the record is
6 not only evidentiary in nature, it is the entire process
7 here, all of the events that occurred over the four months
8 from the filing in July to the actual sale on November 5th.

9 First, let's begin even before the filing of the
10 bankruptcy with the negotiation of the asset purchase
11 agreement which became the stalking horse bid during the
12 auction process. Mr. Pollack, the investment advisor for
13 the debtors, testified at the August 23rd hearing -- and
14 this is beginning at page 127 of that transcript, testified
15 that the terms of the asset purchase agreement were the
16 subject of extensive discussion and negotiation and he lists
17 there the items that were actually negotiated by the parties
18 in which the debtors were able to obtain more favorable
19 terms: the covenants, the representations and warranties,
20 the material adverse change clause, the timing and financing
21 terms, and concludes at page 200 with the statement, yes,
22 this was definitely an arm's-length negotiation.

23 And those same comments are supported by the
24 record on, at the hearing on September 2nd -- excuse me.
25 November 2nd at pages 111 and 112 of the transcript. Again,

1 Mr. Pollack repeats: "I would characterize the negotiations
2 as spirited, both parties taking very strong positions and
3 working toward a negotiated contract."

4 THE COURT: Mr. Phillips, let me interrupt you
5 long enough to say this. Take it just for argument's sake
6 for a moment that no one is going to go at the sale process
7 itself. That the focus is on MHR's assertion that precise
8 behavior ought to be something that is looked at.

9 Is there anything in the record on that point,
10 Mr. Slattery was referring to some discussion on that, that
11 indicates that that surfaced, was discussed at a point
12 before the Bankruptcy Court?

13 MR. PHILLIPS: Mr. Slattery is absolutely
14 correct in one respect with respect to that issue, but I
15 would even go beyond what Mr. Slattery was saying about the
16 evidentiary record on this. There is no question that there
17 was argument by counsel at the November 2nd, November 3rd
18 hearing on the sales order by MHR's counsel regarding these
19 issues. However, no evidence was presented of any sort.
20 Not only did MHR never present any witnesses, they didn't
21 even submit into evidence, Your Honor, the deposition
22 transcripts which they assert are now part of the record.
23 They attached portions of deposition transcripts to their
24 motion papers but never offered them into evidence, never,
25 never presented any evidence of any sort regarding this

1 issue beyond attaching excerpts to their objection, and
2 never presented it from an evidentiary standpoint.

3 There was consideration by the Court. As Mr.
4 Fay points out, at one point the Court even says, breaks
5 into the closing argument of Mr. Fay's colleague Mr. Rosner
6 and says, "well, what if I gave you the claim?" And Mr.
7 Rosner stopped for a moment, said, "well, I'd have to make a
8 telephone call, Your Honor." And he said, "well, I'm not
9 going to give you that option. Do you want the claim or
10 not?" And Mr. Rosner says "yes, we want the claim. We'll
11 take the claim and we'll drop our objection." And then the
12 issue was pointed out to the Court and the Court had to go
13 back off of that because of the fact that in fact under the
14 sales order and under the asset purchase agreement, those
15 claims would be released, and that in fact that would
16 represent a material change in the terms of the asset
17 purchase agreement. And the Court recognized that and said
18 "I can't do that at this point." Everything else supports
19 going forward with the asset purchase agreement.

20 The fact is, Your Honor, that there is nothing
21 here in terms of an indication of a lack of good faith in
22 the sales process. All of the testimony, all of the
23 evidence before the Court supports the notion that in fact
24 this was a good faith process. And I understand the Court's
25 concern here.

1 THE COURT: Nothing about my questions should
2 prompt any anybody to say I have a concern. I'm just asking
3 questions.

4 MR. PHILLIPS: The Court's concern in what I was
5 suggesting was the notion that everybody else would accept
6 that the sales process -- there is no question that the
7 sales process was one in which there was an integrity in the
8 bidding process and there was marketing and that in fact
9 there was no indicia of collusion or bad faith or fraud in
10 connection with the actual sales process in the bankruptcy.
11 I believe that is what the Court said.

12 But that is exactly the point. We had a bid
13 here, a stalking horse bid of \$40 million for this company,
14 during the four and-a-half months after that asset purchase
15 agreement was entered into, and that stalking horse bid was
16 obtained, the debtors were able to negotiate enhancements to
17 that bid. And I think the most, the best indicia of good
18 faith here, Your Honor, is in fact the transcript of the
19 November 1st auction which is attached to the sales order
20 itself, in which absent any competing qualifying bid, the
21 debtors actually negotiated with Presstek between \$4-and-\$6
22 million in enhancements to that bid with no other bid out
23 there.

24 And I would suggest to you, Your Honor, that in
25 fact if any claim existed and there is substantial doubt that

1 any claim could have ever been brought against Presstek for
2 breach of the stock purchase agreement, that in fact the
3 debtors were able to obtain the settlement value of those
4 claims right at that point. There is no other explanation,
5 Your Honor, for the fact that here is this bidder with no
6 competing bid out there. And it's offering \$4-to-\$6 million
7 more on its bid at that point in time and in fact the debtor
8 was able to realize those savings that were negotiated. I
9 think that that is the best indication of good faith that
10 the Court could rely upon here. There is multiple examples
11 in the record of this, Your Honor. And I could go through
12 them more.

13 With respect to the claim here of MHR, your
14 Honor, there is nothing in the record from which the Court
15 could have -- even if accepting that somehow legally this
16 was a cognizable argument regarding good faith, that there
17 is nothing in the record from which the Court could have
18 found bad faith because it was counsel's arguments, it was
19 not evidence that was put before the Court, either at the
20 August 23rd hearing on the sales procedure motion or at the
21 November 2nd and 3rd hearings on the sales order.

22 THE COURT: Well, what do you say to the
23 assertion they put a witness on the stand and they put a
24 letter in from a Key Bank official that said we're in, we're
25 funding? When you say there is nothing, that they say there

1 is something, tell me why what they say is nothing.

2 MR. PHILLIPS: What they're saying is something
3 is what they attached to their objection. They attached
4 excerpts of deposition transcripts along with exhibits that
5 were presented at those depositions. They did not ever
6 submit those deposition transcripts into evidence at the
7 sales hearing. They never presented a witness. The only
8 witnesses that were presented at the hearing on November 2nd
9 and 3rd were Mr. Steven Gray, the Chief Restructuring
10 Officer of the debtors, and Mr. Pollack, the investment
11 advisor. Those are the only witnesses that were presented,
12 and in fact neither of them had any knowledge, any direct
13 knowledge of what occurred with respect to the stock
14 purchase agreement on or before June 22nd. All of the other
15 testimony was offered through excerpts from deposition
16 transcripts that were never submitted into evidence at the
17 hearing.

18 THE COURT: All right. Mr. Fay, I'll give you
19 the last word.

20 MR. FAY: Okay. Your Honor, our offering of
21 evidence was clearly in the record. There was no objections
22 to it. It was treated as if it was in the record at the
23 hearing when counsel was arguing and obviously the judge
24 heard us. He offered us this claim. He knew what we were
25 referring to. He knew the evidence that we were referring

1 to here. There was no objection to this evidence, no motion
2 to strike, nothing.

3 The concept that we haven't put in sufficient
4 evidence to find that there was a real concept here is
5 simply not true. You know, if you look at the fact section
6 of our brief, we walked the Court through what happened.

7 Presstek sends a letter to Key Bank: "You
8 haven't consented." Key Bank sends a letter back, "yes, we
9 have." Presstek sends an e-mail, "yes, but you didn't sign
10 the consent and here is the reasons why in the consent.
11 Here is what we didn't get from the consent that we say
12 means you didn't really consent." That is our burden. We
13 showed it. They wanted to put in the consent agreement
14 itself to show that there was some other term that they
15 were relying upon they could do it but there was sufficient
16 evidence to have a prima facie burden of proof that, yes,
17 indeed there was a material consent here and that any
18 quibbling of around the side of it was immaterial and,
19 therefore, under New York law was no basis to walk away from
20 this deal.

21 And, what did counsel just admit? In their
22 briefs, they rely over and over again on the testimony of
23 this Mr. Pollack about the good faith process, the good
24 faith of the negotiations. Mr. Pollack admitted during
25 the hearing he had nothing to do with the stock purchase

1 agreement and didn't even get involved with the asset
2 purchase agreement until one week afterwards. They are
3 relying on everything that happened after the bad conduct.
4 That can't possibly be the case.

5 THE COURT: Well, stop. When you say that that
6 can't possibly be the case, go ahead and pull out your
7 favorite case again and let's talk about page 147 of In Re:
8 Abbotts Dairies. Speak to the legal assertion of your
9 opposing counsel that the standard to be applied is it
10 "speaks to the integrity of conduct in the course of the
11 sale proceedings period." Typically, the misconduct that
12 would destroy purchaser's good faith status of a judicial
13 involved fraud, collusion between the purchaser and other
14 bidders or the trustee in an attempt to take grossly unfair
15 advantage of other bidders. "Integrity in the course of the
16 sale procedures," that is what they're relying heavily upon.

17 MR. FAY: That is correct. And we would submit
18 that the course of the sale proceedings for this company
19 extended far beyond its bankruptcy. This company was being
20 sold to Presstek as of June 16th, 2004; right? It then
21 transpired that it went into bankruptcy and was sold in a
22 different way, but this is the sale process. This company
23 had been on the block for a long time. The auction was just
24 the end of what had been a long process of trying to sell
25 this company.

1 To read this provision as narrowly as they do
2 would read out of In Re: Abbotts Dairies the very concerns
3 that the Third Circuit had; right? The Third Circuit talks
4 about an interim agreement that may have diminished the
5 value of the company. Well, if it's only the sales process,
6 you could have argued there this interim agreement doesn't
7 have anything to do with the sales process.

8 It's a far too narrow a definition of good
9 faith. And there is nothing in In Re: Abbotts Dairies
10 that suggests that you have to narrow it that way. And I
11 think in the In Re: Paolo Gucci, Inc. by the Second Circuit
12 says anything that would affect the sale price, anything
13 that tries to control the sale price. This is conduct that
14 affected the sale price. As of the 16th of June, this
15 company had a deal that was double in value.

16 THE COURT: Okay. I got your position.

17 Is there something you are burning to say, Mr.
18 Slattery? It looks like it.

19 MR. SLATTERY: No.

20 THE COURT: No. You are okay? All right.

21 MR. FAY: Thank you, Your Honor.

22 THE COURT: Well, I would like to go back and
23 write this up for you in a nice opinion but the reality is
24 I'm scheduled to be in trial four weeks and this thing has
25 been hanging around long enough. So I'm going to give you a

1 ruling now from the bench. I'll memorialize it in an order
2 and I'm granting the motion to dismiss the appeal as moot
3 for the following reasons.

4 And I recognize that in effect, I mean these
5 things are so tightly interwoven it's hard to separate it
6 out, but my reasoning is as follows: I have a significant
7 question about the appellants effort to read In Re: Abbotts
8 Dairies of Pennsylvania Inc. so broadly as to say that any
9 kind of presale conduct that could be viewed as affecting
10 the value of the asset which is ultimately auctioned is
11 conduct which has to be taken into account in determining
12 whether there has been good faith in the sale process.

13 I think that is too broad a reading of that
14 case. That In Re: Abbotts Dairies speaks to good faith in
15 the sale process that is occurring under the judicial eye of
16 the Bankruptcy Court. That is not to say that you couldn't
17 have something happen prior to that judicial watchfulness
18 that would affect the sale because obviously In Re: Abbotts
19 Dairies says that can't happen but that speaks expressly to
20 a corrupting of the process by collusion and fraud in the
21 way the auction process is developed and there is nothing
22 remotely like that in this case.

23 On the contrary, the only evidence in the record
24 indicates that this was a fully, fair, open auction process.
25 And not even MHR disagrees with that. The only argument MHR

1 makes is that the behavior of Presstek prior to the
2 bankruptcy was such as to make the value of the asset less
3 once they were in bankruptcy and, therefore, they couldn't
4 be good faith purchasers for value under the Code.

5 Now, maybe you will be right and maybe the Third
6 Circuit will turn it around. And that is all right with me.
7 I have no ego investment in that but I think you stretched
8 that decision further than it can go, at least without
9 further clarification by the Third Circuit on that point.

10 And since there was no stay, something which
11 frankly I don't understand because In Re: Abbotts Dairies
12 does speak to the importance of a stay expressly and the
13 argument here for counsel from MHR is they knowingly
14 declined to go into that because they were going to rely on
15 In Re: Abbotts Dairies, well, that seems inconsistent to me
16 because the decision itself talks about the significance of
17 a stay. It's hard for me to square those two positions, the
18 reality of the factual record and the argument that is made
19 here about why no stay was sought.

20 I also note the Bankruptcy Court twice heard MHR
21 on this very point and twice rejected it on this very point.
22 And by this very point, I mean that Presstek has somehow
23 got such unclean hands, it could never be a good faith
24 purchaser. So to say that the Bankruptcy Court didn't
25 make a finding in good faith I don't think squares with

1 the record in that regard. The argument was twice made and
2 twice rejected.

3 The assertion that was wholly conclusory and
4 that the Bankruptcy Court was just asleep at the switch I
5 think is not borne out by the extensive record that was
6 created by the questioning that occurred during the argument
7 that was made to the Court which has been brought out here
8 and discussed. You know, it's interesting to hear the
9 different spins that the two sides put on it, but it's
10 clear, as Mr. Fay said on behalf of MHR, that the judge knew
11 what MHR's evidence was. As you said, he knew what you were
12 referring to, it was in record. He did indeed. He was
13 paying attention. And that tells me that this wasn't some
14 circumstance where the judge didn't know what was going on.
15 The judge knew what was going on, heard you, rejected the
16 argument, made a finding that there was good faith
17 sufficient to permit this sale to occur.

18 And so under 363(m), I believe I am bound to say
19 that the underlying sale or lease was not stayed pending
20 appeal and there wasn't anything to indicate that something
21 was going on that would affect the validity of the sale.
22 That there's no bad faith that would prevent that sale
23 process from having the full force and effect of law. I
24 think were I to hold otherwise, I would dramatically
25 undermine the policy of finality and certainty which that

1 statutory section is supposed to provide people and it would
2 apply in the face of the Third Circuit precedent like
3 *Cinicola v Scharffenberger* which emphasizes the importance
4 of that policy.

5 So for those reasons, I'm granting the motion to
6 dismiss the appeal as moot. I'll give you basically a one
7 sentence order that memorializes this by saying "for the
8 reasons stated in open court ..." You will have your
9 opportunity at that point then to take this up and maybe you
10 will get some further law from the Third Circuit about just
11 how far the notion of good faith in the course of the sale
12 extends and, who knows, maybe we'll be back here.

13 All right. Thanks for your time this morning.
14 We're in recess.

15 (Proceedings end at 10:12 a.m.)
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